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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

MATTHEW B. ANDREEF, Plaintiff and Appellant, v. WELLS FARGO BANK, N.A., et al., Defendants and Respondents.	B287175 (Los Angeles County Super. Ct. No. EC067068)

APPEAL from a judgment of the Superior Court of Los Angeles County, William D. Stewart, Judge. Affirmed.

Tiffany N. Travillion for Plaintiff and Appellant.

Anglin Flewelling Rasmussen Campbell & Trytten and Robert A. Bailey for Defendant and Respondent Wells Fargo Bank, N.A.

Aldridge Pite, Peter J. Salmon, Jillian A. Benbow and Fred T. Winters for Defendant and Respondent Clear Recon Corp.

Xavier Becerra, Attorney General, Nicklas A. Akers, Assistant Attorney General, and Michele Van Gelderen, Deputy Attorney General, as Amicus Curiae on behalf of Plaintiff and Appellant.

After defaulting on a secured loan and failing to secure a third loan modification, plaintiff sued his lender (among others) for damages, declaratory relief, and to prevent a foreclosure sale. The trial court sustained the lender's demurrer to the complaint without leave to amend, and dismissed the lawsuit. We affirm.

FACTUAL BACKGROUND[1]

In July 2004, plaintiff and appellant Matthew Andreef (appellant) obtained a mortgage loan (Loan) from World Savings Bank, FSB (WSB). WSB was a federal savings bank (FSB), chartered under the federal Home Owners' Loan Act (HOLA), 12 U.S.C. section 1461, et seq., the primary regulator of which was the federal Office of Thrift Supervision (OTS). Appellant's Loan with WSB succeeded to Wachovia Mortgage, FSB, and ultimately, to defendant and respondent Wells Fargo, N.A. (Wells Fargo). The Loan was memorialized in a promissory note (Note) secured by a deed of trust on a residential property in Burbank (Property).

Appellant became delinquent on his payments on the Loan and, in October 2006 and August 2009, entered into loan modification agreements with Wells Fargo. Appellant again defaulted on the Loan in November 2009. In April 2012, Wells Fargo's agent, Cal–Western Reconveyance Corp. (Cal–Western), recorded a Notice of Default on the

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[1] The facts are drawn from plaintiff's verified complaint, and documents as to which judicial notice was taken.

Property. In March 2017, Cal–Western issued a Notice of Trustee's sale.

Between 2012 and 2016, appellant "submitted several loan modification packages," each of which was denied. Appellant appealed from the final denial in July 2016. In October 2016, Wells Fargo informed appellant that "his appeal had 'fell [*sic*] out of the [loan] modification process[,]'" and "he would need to resubmit a completely new loan modification application." In March 2017, when Cal–Western recorded a notice of trustee's sale (foreclosure), the Loan balance was $453,412.98.

In April 2017, appellant "re-submitted another application for a loan modification." On April 26, 2017, Wells Fargo informed appellant that his application had been denied, "based on the results of [appellant's] net present value (NPV) evaluation." He was given 36 days to appeal the denial. On May 15 and May 22, 2017, appellant contacted Wells Fargo to request the NPV evaluation on which the denial was based. Wells Fargo mailed the NPV information to appellant on May 22, 2017.

On May 31, 2017, appellant submitted an appeal from the loan modification denial. He provided an appraisal indicating that the Property was in a state of severe disrepair and worth only $340,000, approximately $200,000 less than Wells Fargo's appraised amount. On June 5, 2017, Wells Fargo informed appellant he would have to pay $200 by June 20, 2017, to obtain a reappraisal.

Appellant alleges that he timely submitted $200 for a new appraisal. Documentation submitted by Wells Fargo in opposition to

appellant's request for a preliminary injunction reflects that appellant did not remit the $200 payment for the reappraisal until at least July 5, 2017. In late June 2017, Wells Fargo informed appellant that his request for a loan modification was under review. On July 19, 2017, Wells Fargo informed appellant that it had "recently reviewed [his] loan," that his "previously remitted funds" of $200 were being returned because the amount was "less than the total amount required to bring [his] loan current," and that it would proceed with foreclosure. It is undisputed that foreclosure occurred on May 23, 2018.

PROCEDURAL BACKGROUND

On August 2, 2017, appellant filed this action against Wells Fargo among others, seeking damages and declaratory and injunctive relief. Appellant alleged six causes of action, as follows: (1) declaratory relief; (2) fraud; (3) negligence; (4) lack of standing to foreclose under Civil Code section 2924 [for unauthorized recording of notice of default]; (5) lack of standing under Civil Code section 2923.6, et seq.; and (6) unlawful business practices in violation of Business and Professions Code section 17200 [failure to comply with California's statutes governing non-judicial foreclosure].

On August 3, 2017, the court granted appellant's ex parte request for a temporary restraining order barring foreclosure, and set an OSC re: Preliminary Injunction. Wells Fargo demurred to the complaint. At the court's request, Wells Fargo submitted evidence reflecting that appellant did not tender payment for the reappraisal until at least July 5, 2016.

A joint hearing on the OSC and demurrer was conducted on October 20, 2017. Following that hearing, the court adopted its tentative ruling denying appellant's request for a preliminary injunction, and sustained Wells Fargo's demurrer without leave to amend. Appellant filed a timely notice of appeal from the November 15, 2017 judgment and dismissal of the action.[2]

On December 20, 2018, the California Attorney General filed an amicus curiae brief. Wells Fargo filed a response to the brief of amicus curiae on January 15, 2019.

DISCUSSION

1. *Standard of Review*

We independently review a judgment dismissing an action after an order sustaining a demurrer without leave to amend to determine whether the complaint alleges facts sufficient to state a cause of action on any legal theory or discloses a complete defense. (*Akopyan v. Wells Fargo Home Mortgage, Inc.* (2013) 215 Cal.App.4th 120, 130–131 (*Akopyan*); *Tenet Healthsystem Desert, Inc. v. Blue Cross of California*

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[2] In response to the complaint, respondent Clear Recon Corp. (Clear Recon) submitted a Declaration of Non-Monetary Status (Declaration). (See Civ. Code, § 2924l [providing that a party may file a notice of non-monetary status if it has a "reasonable belief" that it has been named in the action solely in its capacity as a trustee, and not arising out of any alleged wrongful acts or omissions, and also providing that if no party objects within 15 days, the trustee shall not be required to participate any further in the action].) Appellant did not file an objection to Clear Recon's Declaration, and he has not raised an issue on appeal regarding that Declaration.

(2016) 245 Cal.App.4th 821, 833 (*Tenet Healthsystem*).) In making this determination, we assume the truth of properly pleaded material facts, but not contentions, deductions or conclusions of fact or law; we may also consider matters subject to judicial notice. (*Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 924.) "'[W]e decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse. [Citation.]' [Citation.]" (*Lueras v. BAC Home Loans Servicing, LP* (2013) 221 Cal.App.4th 49, 61; see *Klein v. Chevron U.S.A., Inc.* (2012) 202 Cal.App.4th 1342, 1387, fn. 16.)

The burden of showing the pleaded facts are sufficient to establish each element of a cause of action and overcome the legal grounds on which the demurrer was sustained, or that "'there is a reasonable possibility that the defect [in the pleading] can be cured by amendment'" rests squarely on appellant. (*Tenet Healthsystem, supra,* 245 Cal.App.4th at p. 833; *Bergeron v. Boyd* (2014) 223 Cal.App.4th 877, 890.) Such a showing may be made for the first time on appeal. (*Sanowicz v. Bacal* (2015) 234 Cal.App.4th 1027, 1044 ["having requested an opportunity to amend in the trial court is not a condition precedent to [the appellate court] granting such relief"].)

2. *Whether Preemption Applies*

Appellant's claims for fraud, negligence and unfair business practices are premised on the theory that Wells Fargo violated section 2923.6 of what is commonly referred to as the "Homeowners' Bill of

Rights" (HOBR), Civil Code sections 2920.5 et seq.,[3] by proceeding with foreclosure to collect its debt, notwithstanding appellant's pending application for a loan modification.[4] Appellant, supported by Amicus Curiae, argues that his claims are not preempted by HOLA because the misconduct allegedly committed by Wells Fargo occurred after the Loan was transferred from WSB, and Wells Fargo is not entitled to invoke HOLA preemption.[5]

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[3] "Although the Legislature did not give the legislation a title, the Governor in his signing statement, and courts and commentators, have referred to the legislation as the 'California Homeowner Bill of Rights.'" (*Monterossa v. Superior Court* (2015) 237 Cal.App.4th 747, 749, fn. 1.)

[4] Wells Fargo argues that appellant's claims seeking to bar foreclosure were rendered moot by the completed foreclosure sale and the automatic repeal of section 2923.6, effective January 1, 2018. (§ 2923.6, subd. (k).) Appellant concedes that his first, fourth and fifth causes of action (for declaratory relief and lack of standing under the HOBR are moot. Accordingly, our discussion relates to the three remaining claims (for fraud, negligence and violation of Business and Professions Code section 17200, et seq.).

[5] Amicus raises other arguments not advanced by appellant, nor considered by the trial court. In particular, Amicus urges us to find that, even if Wells Fargo, a non-thrift, could invoke HOLA preemption, that defense should not apply to Appellant's claims, premised on violations of California foreclosure law. Generally, amici curiae must take a case as they find it. (See *United Parcel Service, Inc. v. Mitchell* (1981) 451 U.S. 56, 60, fn. 2 [declining to entertain contention raised by amicus curiae since it was not raised by the parties either at trial or on appeal]; *California Building Industry Assn. v. State Water Resources Control Bd.* (2018) 4 Cal.5th 1032, 1048, fn. 12 (*California Building Industry Assn.*); accord Eisenberg et al., Cal. Practice Appeals Guide: Civil Appeals and Writs (The Rutter Group 2018) ¶ 9:210.1, p. 9-61.) Amicus briefs should be confined to questions properly

a. *Federal Preemption in the Area of National Banking, Generally*

The Supreme Court has long held that federal law is supreme over state law in the area of national banking. (*Watters v. Wachovia Bank, N.A.* (2007) 550 U.S. 1, 10–11.) As we explained in *Akopyan*, the "supremacy clause of the United States Constitution requires courts to follow federal rather than state law if, in enacting a federal statute, Congress intended to set aside state law. [Citation.]" (*Akopyan, supra,* 215 Cal.App.4th at pp. 137–138.)

Moreover, "Federal regulations have the same preemptive effect as the statutes under which they are promulgated, and the agency's reasonable construction of the statute it is charged with enforcing is entitled to deference. [Citation.] The agency's interpretation of its own regulations controls unless it is plainly erroneous or inconsistent with the regulations. [Citation.]" (*Akopyan, supra,* 215 Cal.App.4th at p. 138.)

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presented by an appealing party, and additional questions raised in an amicus brief ordinarily will not be considered. (*California Building Industry Assn.,* at p. 1048, fn. 12; *People v. Hannon* (2016) 5 Cal.App.5th 94, 105–106; *Rental Housing Owners Assn. of Southern Alameda County, Inc. v. City of Hayward* (2011) 200 Cal.App.4th 81, 95, fn. 13.; *California Assn. for Safety Education v. Brown* (1994) 30 Cal.App.4th 1264, 1274 [Amicus curiae may not "'launch out upon a juridical expedition of its own unrelated to the actual appellate record"'].) We therefore decline to consider the additional arguments raised by Amicus.

b. *HOLA Preemption*

The trial court found appellant's state law claims were preempted by HOLA. HOLA, enacted as a result of the Great Depression of the 1930s, was intended "'to provide emergency relief with respect to home mortgage indebtedness' at a time when as many as half of all home loans in the country were in default." (*Fidelity Federal Sav. & Loan Assn. v. de la Cuesta* (1982) 458 U.S. 141, 159.) Under HOLA, Congress gave the Office of Thrift Supervision (OTS) "plenary authority to issue regulations governing federal savings and loans." (*Id.* at p. 160, citing 12 U.S.C. § 1464.) "The broad language of [HOLA] expresses no limits on [OTS]'s authority to regulate the lending practices of federal savings and loans." (*Id.* at p. 161.)

Pursuant to its plenary authority, OTS adopted the now–superseded lending preemption regulation (12 C.F.R. § 560.2), at issue here.[6] (61 Fed.Reg. 50952 (Sept. 30, 1996).) By that regulation, "the OTS announced its intent to preempt 'the entire field of lending

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6 Following "enactment of the Dodd–Frank Act . . . , the OTS was merged into the Office of the Comptroller of the Currency (OCC), which regulates national banks under the NBA [National Bank Act]." (*Akopyan, supra,* 215 Cal.App.4th at p. 139, fn. 10.) For purposes of the discussion relevant to the timing of events at issue here, we refer to the agency as OTS. In August 2011, OCC issued an Interim Final Rule superseding section 560.2. But that rule does not apply retroactively (see *Davis v. World Savings Bank, FSB* (D.D.C. 2011) 806 F.Supp.2d 159, 166, fn. 5), but only to contracts entered on or after Dodd-Frank's effective date in July 2010. (*Tamburri v. Suntrust Mortg., Inc.* (N.D. Cal. 2012) 875 F.Supp.2d 1009, 1020.) The Loan at issue here was entered in July 2004. Therefore, section 560.2 applies here.

regulation for federal savings associations,' in order to give them 'maximum flexibility to exercise their lending powers in accordance with a uniform federal scheme of regulation. Accordingly, federal savings associations may extend credit as authorized under federal law . . . without regard to state laws purporting to regulate or otherwise affect their credit activities . . . .' (12 C.F.R. § 560.2(a).)" (*Akopyan, supra,* 215 Cal.App.4th at p. 139; see *Silvas v. E*Trade Mortg. Corp.* (9th Cir. 2008) 514 F.3d 1001, 1005 (*Silvas*).) A nonexhaustive list of Examples of state laws preempted by 12 C.F.R. section 560.2(b) includes: "(4) The terms of credit, including amortization of loans and the deferral and capitalization of interest and adjustments to the interest rate, balance, payments due . . . [¶] . . . [and] [¶] (10) Processing, origination, servicing, sale or purchase of, or investment or participation in, mortgages." (12 C.F.R. § 560.2(b)(4), (10).) The determination whether a state law cause of action is encompassed within these regulations focuses on the "functional effect upon lending operations of maintaining the cause of action," not the label attached to a claim. (*Naulty v. GreenPoint Mortg. Funding, Inc.* (N.D. Cal. 2009) 2009 WL 2870620.) If a state law claim falls within paragraph (b), that law is preempted and the inquiry ends. (*Silvas,* at p. 1005, fn. 1 [OTS's "construction . . . must be given controlling weight"].)

HOLA and its regulations have been described "as a 'radical and comprehensive response to the inadequacies of the existing state system,' and 'so pervasive as to leave no room for state regulatory control.'" (*Silvas, supra,* 514 F.3d at p. 1005, fn. 1; see *Fidelity Federal*

Sav. & Loan Assn. v. de la Cuesta, supra, 458 U.S. at p. 161 ["'It would have been difficult for Congress to give the Bank Board a broader mandate'"]; *Lopez v. World Savings & Loan Assn.* (2003) 105 Cal.App.4th 729, 738 (*Lopez*) [HOLA regulations "preempt all state laws purporting to regulate any aspect of the lending operations of a federally chartered savings association, whether or not OTS has adopted a regulation governing the precise subject of the state provision"].)

12 C.F.R. section 560.2(c) "saved from preemption certain state laws . . . 'to the extent that they only incidentally affect the lending operations of Federal savings associations or are otherwise consistent with the purposes of paragraph (a) . . . .' (12 C.F.R. § 560.2(c)(1).)" (*Akopyan, supra,* 215 Cal.App.4th at p. 139.) However, under section 560.2, if a state law affects the lending operations of covered entities, the law is presumptively preempted and that presumption can be overcome only if the law is clearly shown to fit within the confines of paragraph (c). Paragraph (c) is interpreted narrowly, and any doubts must be resolved in favor of preemption. (OTS, Final Rule, 61 Fed.Reg. 50951, 50966-67 (Sept. 30, 1996).) (See *Silvas, supra,* 514 F.3d at pp. 1004–1005.)

c. *Application of HOLA Preemption in This Action*

To determine if a state law is preempted by HOLA, the court looks to a list of specific examples provided in section 560.2(b). If that inquiry is not dispositive, it must determine whether the law in question

nonetheless affects lending. (*Silvas, supra*, 514 F.3d at p. 1005.) "Any doubt should be resolved in favor of preemption." (*Ibid*.)

Wells Fargo is not a federal savings association. But Wells Fargo maintains that, because the Loan originated with an FSB to which Wells Fargo is a successor, HOLA preemption applies. Numerous courts have found that HOLA preemption follows a loan after it is made and as it passes among different holders. However, appellant and Amicus Curiae assert that an increasing number of courts have rejected this rationale and applied HOLA preemption only to conduct that occurred before a loan changed hands from a thrift or FSB to an entity not governed by HOLA. (See e.g., *Grigsby v. Wells Fargo Bank, N.A.* (C.D. Cal. 2018) 2018 WL 1779338 ["align[ing] itself with 'the growing trend'" to reject argument that HOLA preemption may be transferred from a thrift to a non-thrift for conduct arising after the transfer); *Penermon v. Wells Fargo Bank* (N.D. Cal. 2014) 47 F.Supp.3d 982 (*Penermon*); *Rijhwani v. Wells Fargo Home Mortgage, Inc.* (N.D. Cal., Mar. 3, 2014) 2014 WL 8900162, at *7 (*Rijhwani*); *Leghorn v. Wells Fargo Bank, N.A.* (N.D. Cal. 2013) 950 F.Supp.2d 1093, 1107-1108 (*Leghorn*); *Hopkins v. Wells Fargo Ba*nk, *N.A.* (E.D. Cal. 2013) 2013 WL 2253837.) Premised on this authority, appellant and Amicus Curiae assert that "'preemption is not some sort of asset that can be bargained, sold, or transferred.'" (*Rijhwani, supra,* 2014 WL 8900162, at *7.) They maintain that a non-thrift like Wells Fargo cannot inherit HOLA preemption protection for wrongful acts taken after the federal savings association ceases to exist. (See *Hixson v. Wells Fargo Bank N.A.* (N.D.

Cal. 2014) 2014 WL 3870004; see also *Leghorn, supra*, 950 F.Supp.2d at p. 1108 [the "timing of the challenged conduct" determines whether HOLA preemption applies to claims against a national bank in cases where the loan originated from a HOLA regulated bank]).[7]

Appellant's contention that HOLA does not preempt his state claims is premised on what is still a minority view under which the court must consider whether the alleged violations took place when the banking entity was covered by HOLA. Under this view, Wells Fargo inherits the liabilities and possible defenses WSB could raise regarding its own conduct, but is not itself protected with regard to state law

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[7] Courts have adopted three distinct positions on this issue. The first, and majority view, holds that HOLA preemption applies to all conduct related to a loan originated by federal savings associations. (See, e.g., *Akopyan, supra,* 215 Cal.App.4th at p. 138; *Ramirez v. Wells Fargo Bank N.A.* (C.D. Cal. 2016) 2016 WL 7448136, at *5; *Caovilla v. Wells Fargo Bank, N.A.* (N.D. Cal. 2013) 2013 WL 2153855, at *6; *DeLeon v. Wells Fargo Bank, N.A.* (N.D. Cal. 2010) 729 F.Supp.2d 1119, 1126.) The second position is that HOLA preemption does not apply to claims against a national bank successor to an FSA, regardless of when the claims arose. (See e.g., *Roque v. Wells Fargo Bank N.A.* (C.D. Cal. Feb. 3, 2014) 2014 WL 904191, at *4; *Albizo v. Wachovia Mortg.* (E.D. Cal. Apr. 20, 2012) 2012 WL 1413996, at *15-16; *Gerber v. Wells Fargo Bank, N.A.* (D. Ariz. Feb. 9, 2012) 2012 WL 413997, at *3-4. The third position is that HOLA preemption applies to loans transferred to a successor of an FSA, but only for claims arising from conduct by the FSA. HOLA preemption does not apply if a claim arises based on conduct by a successor national bank. (See e.g., *Calimpusan v. Wells Fargo Bank, N.A.* (C.D. Cal. 2016) 2016 WL 7486598, at *5; *Leghorn*, *supra*, 950 F.Supp.2d at pp. 1107–1108; *Rhue v. Wells Fargo Home Mortgage, Inc.* (C.D. Cal. 2012) 2012 WL 8303189, at *2-3; *Valtierra v. Wells Fargo Bank, N.A.* (E.D. Cal. 2011) 2011 WL 590596, at *3-4.)

violations for loans originated by an entity regulated by HOLA. (*Penermon, supra,* 47 F.Supp.3d at p. 995.)

Courts are split on this question. Nevertheless, this Court, the OTS and the majority of courts to have addressed the issue have held that HOLA preemption runs with a loan and have applied HOLA preemption broadly. (See *Akopyan, supra*, 215 Cal.App.4th at pp. 140–141; *Lopez*, *supra*, 105 Cal.App.4th at pp. 738, 734–742; *Faught v. Wells Fargo Bank, N.A.* (E.D. Cal. 2018) 2018 WL 1071269 at *5 (*Faught*); *Heagler v. Wells Fargo Bank, N.A.* (E.D. Cal. 2017) 2017 WL 1213370 (*Heagler*).)

The power to govern thrifts is vested in OTS. (*Akopyan, supra*, 215 Cal.App.4th at p. 138; *Lopez, supra,* 105 Cal.App.4th at pp. 734–742; see 12 C.F.R. §§ 545.2, 560.2 (2012) [preemption clauses].) In accordance with the OTS's opinion letters, most courts have held that HOLA preemption applies to a successor–in–interest of a federal savings association.[8] (See OTS Opinion Letter, P-2003-5 (July 22, 2003) [state laws cannot apply to the management and servicing of a loan originated by federal savings associations after that loan is sold or assigned to another entity because state law "might interfere with the ability of federal savings associations to sell mortgages . . . originate[d] under a uniform federal system"].) (*Akopyan, supra*, 215 Cal.App.4th at

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[8] OTS's Opinion Letters are public records reflecting the agency's interpretation of its regulations. Such letters are routinely considered as persuasive authority in cases interpreting agency regulations. (See *Silvas, supra,* 514 F.3d at p. 1005, fn. 1; *Akopyan, supra,* 215 Cal.App.4th at p. 148.)

p. 142.)[9] The "rationale for applying preemption to the assignees of federal thrifts is to allow the thrifts themselves greater freedom from state interference." (*Akopyan, supra*, 215 Cal.App.4th at p. 148.) This rationale has prevailed in the majority of cases that have considered the issue. (See *Faught, supra,* 2018 WL 1071269 at *5; *Heagler, supra,* 2017 WL 1213370; *Metzger v. Wells Fargo Bank, N.A.* (C.D. Cal. 2014) 2014 WL 1689278, at *3-4 (*Metzger*); *Castillo v. Wells Fargo Bank, N.A.* (C.D. Cal. 2016) 2016 WL 7479403, at *3; *Houman v. Wells Fargo Bank, N.A.,* (C.D. Cal. 2016) 2016 WL 7444869, at *5); *Lopez v. Wells Fargo Bank, N.A.* (N.D. Cal. 2016) 2016 WL 283507, at *3; *Campos v. Wells Fargo Bank, N.A.* (C.D. Cal. 2015) 2015 WL 5145520, at *5; *Villareal v. Seneca Mortg. Services* (E.D. Cal. 2015) 2015 WL 2374288, at *5; *Aldana v. Bank of America, N.A.* (C.D. Cal. 2014) 2014 WL 6750276, at *6; *Hayes v. Wells Fargo Bank, N*.A. (S.D. Cal. 2014) 2014 WL 3014906, at *4.) Persuasive reasoning and the weight of this authority supports our conclusion. Appellant's Loan originated with WSB, an FSB subsequently acquired by Wells Fargo, a national banking association. Our conclusion is aligned with the courts that have concluded that

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[9] Amicus Curiae's attempt to parse the language in *Akopyan* to limit its holding to loans serviced by thrifts is not consistent with the language of the opinion. There, we observed that "'[t]he marketability of a mortgage in the secondary market is critical to a savings and loan, for it thereby can sell mortgages to obtain funds to make additional home loans.'" (*Akoypan, supra*, 215 Cal.App.4th at p. 142.) Thus, we concluded: "the rationale for applying preemption to the assignees of federal thrifts is to allow the thrifts themselves greater freedom from state interference." (*Id.* at p. 148.) Preemption applies to successors who receive loans originated by thrifts.

HOLA preemption continues to apply to conduct related to loans originated by a FSB or thrift even after those entities merge into national banking associations. (See, e.g., e.g., *Penermon, supra,* 47 F.Supp.3d at p. 995 [acknowledging that a contrary holding constitutes the "minority view"]. Appellant's HOBR claims are preempted by HOLA.

d. *Appellant Contractually Agreed to be Bound by HOLA*

The demurrer was properly sustained for an independent reason. At the time he entered into the Loan, appellant expressly agreed it would be governed by the federal law and regulations applicable to federally chartered savings institutions. Appellant contractually agreed to be bound by HOLA preemption which would travel with the Loan. HOLA applies not only to WSB's conduct in originating the Loan, but also to Wells Fargo's alleged misconduct after succeeding WSB as the lender. (*Romero v. Wells Fargo Bank, N.A.* (C.D. Cal. 2015) 2015 WL 12781210, at *5; ["where the terms of a loan expressly incorporate federal regulations governing [FSA's], those regulations apply to the conduct of a successor to the loan, even where the successor is not [an FSA]"; *Metzger, supra*, 2014 WL 1689278.)

Appellant's Note and Deed of Trust each provide: "This Security Instrument and the Secured Notes shall be governed by and construed under federal law and federal rules and regulations, including those for federally chartered savings institutions." The "federal rules and regulations . . . for federally chartered savings institutions" include HOLA and its regulations. (12 C.F.R. § 560.2(a).) Appellant also

explicitly agreed that "Lender's rights" under the Deed of Trust would survive a merger: "Any Person who takes over [Lender's] rights or obligations under this Security Instrument will have all of [Lender's] rights and will be obligated to keep all of [Lender's] agreements made in this Security Instrument." The Deed of Trust specifically defines WSB and "ITS SUCCESSORS AND/OR ASSIGNEES" as "Lender . . . A FEDERAL SAVINGS BANK which is organized and exists under the laws of the United States." The Note expands this definition, identifying a "lender" as "anyone to whom [the] Note is transferred." "[I]t is hornbook law that the assignee of a mortgage succeeds to all of the assignor's rights power and equities." (*Progressive Consumers Federal Credit Union v. U.S.* (1st Cir. 1996) 79 F.3d 1228, 1238.)

Based on language identical to that in the Deed of Trust involved here, courts have found that HOLA preemption obtains after a merger. (See e.g., *Marquez v. Wells Fargo Bank, N.A.* (N.D. Cal. 2013) 2013 WL 5141689, at *4 (*Marquez*) ["[G]iven that plaintiffs contracted with a [FSB], and that the parties agreed to be bound by such laws under the terms of the Deed of Trust, the court finds no bar to applying HOLA preemption"]; *Carley v. Wells Fargo Bank* (N.D. Cal. 2014) 2014 WL 5830146, at *4 [HOLA preemption applies where parties agreed to be bound by such laws under the terms of the Deed of Trust]; *Babb v. Wachovia Mortg., FSB* (C.D. Cal. 2013) 2013 WL 3985001 at *4 [same]; *Appling v. Wachovia Mortg., FSB* (N.D. Cal. 2010) 745 F.Supp.2d 961, 971 (*Appling*) [a loan that originated with WSB remains subject to HOLA following merger with a National Bank]; but see *Pimentel v.*

Wells Fargo, N.A. (N.D. Cal. 2015) 2015 WL 2184305 ["adopt[ing] the minority view of HOLA preemption" to find that "'Wells Fargo . . . inherit[s] the liabilities and possible defenses that Wachovia could raise about its own conduct, [but] . . . itself cannot violate state laws when servicing loans . . . originated by an entity regulated by HOLA"']; *Rijhwani, supra*, 2014 WL 890016 at *6-7.)

The OTS adheres to the "principle that loan terms should not change simply because an originator entitled to federal preemption may sell or assign a loan to an investor that is not entitled to federal preemption." (OTS Opinion Letter, P-2003-5 (July 22, 2003).) Courts have largely agreed that, where the terms of a loan expressly incorporate federal regulations governing federal savings associations, those regulations govern the conduct of a successor to the loan, even where the successor is not a federal savings association. (See e.g., *Marquez, supra,* 2013 WL 5141689, at *4; *Babb, supra,* 2013 WL 3985001, at *4.) To adopt appellant's analysis and find the Loan not subject to the rules and regulations applicable to FSA's would require us to impermissibly rewrite unambiguous contractual terms. (See Civ. Code, §§ 1638, 1639.)

Appellant's and Amicus Curiae's contention that HOLA preemption does not apply is unpersuasive, and we find no flaw in the trial court's analysis. Appellant expressly agreed the Loan was governed by federal law and regulations for federally chartered savings institutions. In short, he agreed to be bound by HOLA. We continue to adhere to the principle that HOLA preemption travels with a thrift-

originated loan, even after it has been sold to a non-thrift like Wells Fargo. (*Akopyan, supra*, 215 Cal.App.4th at p. 148.)[10]

3. *The Trial Court Did Not Err in Denying Leave to Amend*

Appellant contends that the trial court erred in denying his request for leave to amend the complaint. We must determine if there is a reasonable possibility the pleading deficiencies can be cured. (*Lueras v. BAC Home Loans Servicing, LP, supra,* 221 Cal.App.4th at p. 61; *Klein v. Chevron U.S.A., Inc., supra*, 202 Cal.App.4th at p. 1387, fn.

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[10] Appellant does not argue that his claims are exempt from federal preemption under 12 C.F.R. section 560.2(c), only that Wells Fargo cannot invoke HOLA preemption, an assertion we reject. Thus, we need not address the effect of HOLA's application to individual claims. Appellant has forfeited any argument that, even if HOLA applies, his claims are exempt from preemption. (See *Kurinij v. Hanna & Morton* (1997) 55 Cal.App.4th 853, 865 [to satisfy his burden, an appellant must "present argument and authorities on each point to which error is asserted, or else the issue is waived"]; *Pfeifer v. Countrywide Home Loans, Inc.* (2012) 211 Cal.App.4th 1250, 1282 [issues not raised in the opening brief are waived and abandoned].)

Appellant's state law claims for common law negligence, fraud and UCL violations are based on Wells Fargo's lack of meaningful review and dual tracking allegations regulated by HOLA, not on the bank's unrelated conduct. "What matters for purposes of [Wells Fargo's] preemption defense . . . is not the label [appellant] affixed to his claim, but whether [his] allegations, however styled, fall within the scope of the OTS preemption regulations." (*Appling, supra,* 745 F.Supp.2d at p. 972; see *Silvas, supra*, 514 F.3d at p. 1006.) "California courts have repeatedly held that claims rooted in Section 17200 must plead or allege that a business practice independently forbidden by law has occurred[:] [Wells Fargo] cannot be found liable for committing 'unfair business practices' under Section 17200 without having violated another law." (*Williams v. Wells Fargo Bank, N.A.* (C.D. Cal. 2013) 2013 WL 2047000 at *4.) Thus, to the extent that plaintiff's section 17200 claim depends upon an underlying violation of the HOBR, the claim fails.

16.) It is appellant's obligation to demonstrate there is a reasonable possibility of cure. (*Tenet Healthsystem, supra*, 245 Cal.App.4th at p. 833.) To satisfy this burden, appellant "'must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading [i.e., state a viable cause of action].'" (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349; *Total Call Internat. Inc. v. Peerless Ins. Co.* (2010) 181 Cal.App.4th 161, 166.) The trial court cannot be found to have abused its discretion in denying leave to amend if no potentially effective amendment is possible. (*Audio Visual Services Group, Inc. v. Superior Court* (2015) 233 Cal.App.4th 481, 494.)

The record does not reflect any effort by appellant below to demonstrate a possible cure for the pleading deficiencies, nor has he made an effort on appeal to show a reasonable possibility of such a cure. The trial court considered whether viable amendment was possible. It concluded it did "not appear reasonably possible to correct the defects in the pleadings by amendment because federal law preempt[ed] [appellant's] claims." Appellant has not shown that conclusion was flawed. Instead, he simply "maintains that each cause of action was sufficiently plead." We find no abuse of discretion.

For the forgoing reasons, the court properly found that appellant's state law claims are barred by HOLA preemption, which attaches to Wells Fargo as successor to WSB. (*Akopyan, supra*, 215 Cal.App.4th at p. 138; *Lopez, supra*, 105 Cal.App.4th at pp. 734–742; 12 C.F.R. §§ 545.2, 560.2.) In light of our determination, it is unnecessary to address the parties' or Amicus Curiae's remaining arguments.

DISPOSITION

The judgment is affirmed. Costs are awarded to Wells Fargo.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, J.

We concur:

MANELLA, P. J.

MICON, J.*

*Judge of the Los Angeles County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.